Kalwant Singh a/l Ujagar Singh & Anor v Jaswant Kaur a/p Ujagar Singh & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-11–02 OF 2020(W)
TENGKU MAIMUN CHIEF JUSTICE, ROHANA YUSUF PCA, NALLINI PATHMANATHAN, ZABARIAH YUSOF AND HARMINDAR SINGH FCJJ
11 FEBRUARY 2022

Succession — Will — Construction — Residuary estate — Testator by his will created trust over whole of his estate and devised and bequeathed the same to his trustee whilst specifically excluding his heirs at law as beneficiaries of his estate — Whether absence of residuary clause resulted in partial intestacy over any part of estate

The appellants ('defendants') were granted leave to appeal to the Federal Court on the following single question of law: where a testator by his will created a trust over the whole of his estate and devised and bequeathed the same to his trustee whilst specifically excluding his heirs at law as beneficiaries of his estate, whether the absence of a residuary clause resulted in a partial intestacy over any part of the said estate. The first to fourth respondents ('plaintiffs') and the first and second defendants were the lawful children to Ujagar Singh ('Ujagar') and Nihal Kaur ('Nihal'). Nihal executed her last will and testament on 5 October 2001 and passed away on 24 March 2013. Ujagar executed his last will and testament on 31 March 2007 and passed away on 4 December 2014. Upon the death of Ujagar and Nihal, the first defendant was appointed as the executor for both Nihal's and Ujagar's estates. The plaintiffs subsequently found out through a land search at the land office that the 1/4 share of the property in Nihal's name ('the property') had been transferred to the defendants in equal share. Dispute arose between the siblings, in respect of the property. To resolve the dispute, the plaintiffs filed an originating summons in the High Court. The learned High Court judge found the property fell within the residuary estate of Ujagar and therefore it was to be inherited by the fourth plaintiff only, in line with the intention of Nihal in he will. Aggrieved, the defendants appealed to the Court of Appeal. It was held that the property was not part of his Malaysian estate in the will. As Ujagar's will did not have a residuary clause, the property went into intestacy and consequentially it would pass to all the heirs at law as intestate property in accordance with the Distribution Act 1958. Hence, this appeal.

Held, allowing the appeal:

(1) At the point when Ujagar passed away, he already had beneficial interest in the property which was registered in Nihal's name. As such at that point in time, the property formed part of Ujagar's Malaysian estate. It therefore followed from the expression in Ujagar's will, with particular reference to cl 3, the Malaysian estate was devised and bequeathed to his trustee, ie the first defendant. This would include all real or personal property belonging to or beneficially owned by Ujagar at the point of his demise which included the property which Ujagar obtained from Nihal. Hence, Ujagar's will had brought about a complete testamentary disposition and therefore, the property should be dealt with by way of testamentary disposition (see paras 41–42).

(2) Ujagar, in clear, unambiguous and appropriate language, excluded his daughters and other sons for reasons that he had provided for them financially. Hence, the intent of Ujagar was unmistakable. The Court of Appeal's finding that there was no residuary clause in Ujagar's will, and hence, the said property fell into partial intestacy and was to be distributed in accordance with the Distribution Act 1958 was against settled law and against the clear and express intention of Ujagar in his will at cl 4, which was to exclude all the plaintiffs. The wordings of cl 4 clearly depicted an intention not to benefit those who now claim a partial intestacy. There was no judicial appreciation of this point by the Court of Appeal (see paras 46–47).

(3) The Court of Appeal fell into an erroneous finding that the subject property fell within the residuary estate of Ujagar and that since there was no residuary clause in Ujagar's will, it would be distributed to all the heirs at law as intestate property pursuant to the Distribution Act 1958. Therefore the question posed was answered in the negative. The order of the Court of Appeal was set aside and the property was ordered to go to the first defendant as trustee and executor of the will to be distributed according to the will (see paras 49–50).

[Bahasa Malaysia summary

Perayu ('defendan') telah diberi kebenaran untuk merayu kepada Mahkamah Persekutuan atas satu persoalan undang-undang berikut: di mana pewasiat dengan wasiatnya mencipta amanah ke atas seluruh harta pusakanya dan merangka dan mewasiatkan perkara yang sama kepada pemegang amanahnya sementara secara khusus mengecualikan warisnya di sisi undang-undang sebagai benefisiari harta pusakanya, sama ada ketiadaan klausa bakian menyebabkan kematian tanpa wasiat separa ke atas mana-mana bahagian harta pusaka tersebut. Responden pertama hingga keempat ('plaintif') dan defendan pertama dan kedua adalah anak yang sah kepada Ujagar Singh ('Ujagar') dan Nihal Kaur ('Nihal'). Nihal telah melaksanakan surat wasiat dan wasiat terakhir pada 5 Oktober 2001 dan meninggal dunia pada 24 Mac 2013. Ujagar telah melaksanakan surat wasiat dan wasiat terakhir pada 31 Mac 2007 dan

meninggal dunia pada 4 Disember 2014. Selepas kematian Ujagar dan Nihal, defendan pertama dilantik sebagai wasi untuk kedua-dua harta pusaka Nihal dan Ujagar. Plaintif kemudiannya mendapat tahu melalui carian tanah di pejabat tanah bahawa 1/4 bahagian hartanah atas nama Nihal ('hartanah') telah dipindahkan kepada defendan-defendan dalam bahagian yang sama. Pertikaian timbul antara adik-beradik, berkenaan dengan hartanah. Untuk menyelesaikan pertikaian itu, plaintif memfailkan saman pemula di Mahkamah Tinggi. Hakim Mahkamah Tinggi yang bijaksana mendapati hartanah itu terletak di dalam harta pusaka bakian Ujagar dan oleh itu ia akan diwarisi oleh plaintif keempat sahaja, selaras dengan niat Nihal dalam wasiatnya. Terkilan, defendan merayu kepada Mahkamah Rayuan. Diputuskan bahawa hartanah bukan sebahagian daripada harta pusaka Malaysia dalam wasiat itu. Memandangkan wasiat Ujagar tidak mempunyai klausa bakian, hartanah itu menjadi tidak berwasiat dan akibatnya ia akan berpindah kepada semua waris di sisi undang-undang sebagai hartanah tidak berwasiat mengikut Akta Pembahagian 1958. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Apabila Ujagar meninggal dunia, dia sudah mempunyai kepentingan berfaedah dalam hartanah yang didaftarkan atas nama Nihal. Oleh itu, pada masa itu, hartanah menjadi sebahagian daripada harta pusaka Malaysia Ujagar. Oleh itu, berikutan daripada ungkapan dalam wasiat Ujagar, dengan merujuk khusus kepada klausa 3, harta pusaka Malaysia telah dirangka dan diwariskan kepada pemegang amanahnya, iaitu defendan pertama. Ini termasuk semua harta tanah atau peribadi yang dimiliki atau dimiliki secara berfaedah oleh Ujagar semasa kematiannya termasuk hartanah yang diperoleh Ujagar daripada Nihal. Oleh itu, wasiat Ujagar telah menghasilkan pemberian wasiat yang lengkap dan oleh itu, hartanah harus ditangani dengan cara pemberian wasiat (lihat perenggan 41–42).

(2) Ujagar, dalam bahasa yang jelas, nyata dan sesuai, mengecualikan anak perempuan dan anak lelakinya yang lain atas sebab dia telah menyediakan untuk mereka dari segi kewangan. Oleh itu, niat Ujagar adalah jelas. Penemuan Mahkamah Rayuan bahawa tiada klausa bakian dalam wasiat Ujagar, dan oleh itu, hartanah tersebut jatuh ke dalam kematian tanpa wasiat separa dan akan diagihkan mengikut Akta Pembahagian 1958 adalah bertentangan dengan undang-undang mantap dan bertentangan dengan niat jelas dan nyata Ujagar dalam wasiatnya pada klausa 4, iaitu mengecualikan semua plaintif. Perkataan klausa 4 jelas menggambarkan niat untuk tidak memberi kepentingan kepada mereka yang kini mendakwa kematian tanpa wasiat separa. Tiada penghargaan kehakiman terhadap perkara ini oleh Mahkamah Rayuan (lihat perenggan 46–47).

(3) Mahkamah Rayuan jatuh ke dalam penemuan yang salah bahawa hartanah jatuh dalam harta pusaka bakian Ujagar dan oleh kerana tiada klausa bakian dalam wasiat Ujagar, ia akan diagihkan kepada semua waris mengikut undang-undang sebagai hartanah tidak berwasiat menurut Akta Pengagihan 1958. Oleh itu soalan yang dikemukakan telah dijawab secara negatif. Perintah Mahkamah Rayuan telah diketepikan dan hartanah tersebut diperintahkan untuk diserahkan kepada defendan pertama sebagai pemegang amanah dan pelaksana wasiat untuk diagihkan mengikut wasiat (lihat perenggan 49–50).]

Cases referred to

Abercrombie Estate v Abercrombie 2008 BCSC 389, SC (refd)
Chin Sem Lin's Settlement Yong Tet Foong & Anor v Chin Thin Lee & Ors, Re [1971] 2 MLJ 152 (refd)
Craig (1977) 14 OR (2d) 589, HC (refd)
David Wee Eng Siew (administrator to the estate of Lim Eang Tee, deceased) v Lim Lean Seng & Anor (as executors and trustees of the estate of Lim Eow Thoon, deceased) [2018] supp MLJ 50; [2014] 1 CLJ 299, FC (distd)
Fleming's Will Trusts; Ennion v Hampstead Old People's Housing Trust Ltd and another, Re [1974] 3 All ER 323, Ch D (refd)
Harrison Turner v Hellard, In Re [1885] 30 Ch D 390, CA (refd)
Harford Harford v Morris and others, Re (1959) 1 WIR 310, SC (refd)
Howell v Howell Estate [1999] BCCA 371, CA (refd)
Hsu Yik Chai v Hsu Yaw Tang & Anor [1982] 2 MLJ 227, FC (refd)
Julia Josephine Scale and another v Rawlins and others [1892] AC 342, HL (refd)
Murray Estate 2007 BCSC 1035, SC (refd)
Prouse v Scheuerman 2001 BCCA 100, CA (refd)
Sharpe, Re [1985] 18 DLR (4th) 421, Sc (refd)
Tan Sri Dr M Mahadevan (eksekutor dan pemegang amanah wasiat Ratnavale s/o Mahalingam bertarikh 10.2.1971) v Dr Jeyalakshmi a/p Ratnavale & Ors [2016] MLJU 1773; [2017] 6 CLJ 49, CA (refd)
Tay Seck Loong @ Tay Seck Long & Ors v Teh Chor Chen & Ors [2005] 7 MLJ 612, HC (refd)
West v West [215] A D 285, Sc (refd)
Wilson, Decd, Wilson v Mackay and others, In Re [1967] Ch 53, Ch D (refd)
Wynn (deceased); Landolt v Wynn, Re [1983] 3 All ER 310, Ch D (refd)

Legislation referred to

Distribution Act 1958
Wills Act 1837 [UK] s 23
Wills Act 1959 ss 18, 20, 21, 22, 23, 24

Appeal from: Civil Appeal No W-02(NCvC)(A)-996–05 of 2018 (Court of Appeal, Putrajaya)

Gopal Sri Ram (Harvinderjeet Singh, Sara Ann Chay Sue May and Yasmeen Soh with him) (Vin Law Co) for the appellants.
Jasvinder Singh (Vivek Sukumaran with him) (Asyraf, Vivek & Wee) for the respondents.

Zabariah Yusof FCJ:

[1] The appellants/defendants were granted leave to appeal to the Federal Court on the following single question of law:

> Where a testator by his will creates a trust over the whole of his estate and devises and bequeaths the same to his trustee whilst specifically excluding his heirs at law as beneficiaries of his estate, does the absence of a residuary clause result in a partial intestacy over any part of the said estate?

[2] After hearing the submissions of the parties and due consideration of the written submissions of the same, we unanimously answered the question in the negative and allowed the appeal. We hereby provide our reasons for the said decision.

[3] In this judgment, parties shall be referred to as they were, in the High Court.

BACKGROUND

[4] The first to fourth plaintiffs and the first to second defendants are the lawful children to Ujagar Singh (Ujagar) and Nihal Kaur (Nihal).

[5] Nihal executed her last will and testament on 5 October 2001 and passed away on 24 March 2013.

[6] Ujagar executed his last will and testament on 31 March 2007 and passed away on 4 December 2014.

[7] Upon the death of Ujagar and Nihal, the first defendant was appointed as the executor for both Nihal's and Ujagar's estates. The plaintiffs subsequently found out through a land search at the land office on 19 January 2016 that the 1/4 share of the property held under HS(D) 48086, PT 47593, Mukim and Daerah Kuala Lumpur which was in Nihal's name ('the said property') had been transferred to the defendants in equal share on 19 August 2015.

[8] Dispute arose between the siblings, in respect of the said property.

[9] It is to be noted that the whole property held under HS(D) 48086, PT 47593, Mukim and Daerah Kuala Lumpur were divided into four shares, 1/4 was held by Nihar, 1/4 by Ujagar, 1/4 by the first defendant and second defendant respectively. The disputes as alluded to earlier, relate to the said property, which is the 1/4 share held by Nihal.

[10] The issue is whether the said property was willed in Ujagar's will.

[11] To resolve the dispute, the plaintiffs filed an originating summons in the High Court for certain reliefs. We hereby reproduced the said reliefs prayed for, in its original text:

(a) Bahawa Defendan Pertama selaku Wasi Ujagar Singh a/l Phuman Singh Bertarikh 31.3.2007 menurut Geran probet Ujagar Singh a/l Phuman Singh (Saman Pemula No 32NCVC-308-03/2015) bertarikh 30.3.2015 melaksanakan pembahagian bagi lebihan daripada harta pusaka Ujagar Singh a/l Phuma Singh (iaitu 1/4 bahagian hartanah lot kedai yang dipegang di bawah No. Hakmilik 62660, Lot 47593, Mukim Kuala Lumpur, Wilayah Persekutuan) menurut Akta Probet dan Pentadbiran 1959 kepada kesemua waris-waris Ujagar Singh a/l Phuman Singh dalam tempoh 14 hari dari tarikh perintah;

(b) Bahawa Defendan Pertama selaku Wasi bagi Wasiat Ujagar Singh a/l Phuman Singh bertarikh 31.3.2007 menurut Geran Probet Ujagar Singh a/l Phuman Singh (Saman Pemula No 32NCVC-308-03/2015) bertarikh 30.3.2015 melaksanakan pindahmilik 1/4 bahagian hartanah lot kedai yang dipegang di bawah No. Hakmilik 62660, Lot 47593, Mukim Kuala Lumpur, Wilayah Persekutuan kepada kesemua waris-waris Ujagar Singh a/l Phuman Singh dalam tempoh 14 hari dari tarikh perintah;

(c) Bahawa Defendan-Defendan memberikan pendedahan berkenaan butiran penyewaan dan memberikan Salinan Perjanjian Penyewaan hartanah lot kedai yang dipegang dibawah No. Hakmilik 62660, Lot 47593, Mukim Kuala Lumpur, Wilayah Persekutuan kepada kesemua Plaintif-Plaintif dalam tempoh 14 hari dari tarikh perintah;

(d) Bahawa Defendan-Defendan menyerahkan dan membahagikan hasil bayaran sewa bagi hartanah lot kedai yang dipegang di bawah No. Hakmilik 62660, Lot 47593, Mukim Kuala Lumpur, Wilayah Persekutuan yang mana pengiraan hendaklah bermula dari tarikh kematian Ujagar Singh a/l Phuman Singh kepada Plaintif-Plaintif menurut bahagian yang Plaintif-Plaintif berhak menerima dalam tempoh 14 hari dari tarikh perintah.

THE FINDINGS OF THE HIGH COURT

[12] The learned High Court judge found that the said property fell within the residuary estate of Ujagar, because the said property was never included in Ujagar's will. The will only listed down the following properties:

(a) Ujagar's own 1/4 total share and interest in the shop house No 16, Jalan 23/70A, Desa Sri Hartamas, Kuala Lumpur ; and

(b) Ujagar's 2/3 share in another house No 209, Jalan Maarof, Kuala Lumpur.

[13] As Ujagar's will failed to specifically list down the said property to be willed away, the learned High Court judge concluded that the same fell within the residuary estate of Ujagar and therefore it is to be inherited by the fourth plaintiff only (and/or Harjeet's son), in line with the intention of Nihal in her will at cll 2 and 3 of the will which states:

> 2. I hereby declare that my Will is to be construed and shall take effect in accordance with the Laws of Malaysia.
>
> 3. I give to my husband, UJAGAR SINGH A/L PHUMAN SINGH ... absolutely my undivided share in the shop lot held under ... In the event my husband does not survive me, I give to my fourth son, HARJEET SINGH A/L UJAGAR SINGH ... a life interest in my undivided share in the shop lot ...

[14] As a result, the learned High Court judge allowed the OS application in favour of the fourth plaintiff only (Harjeet Singh).

THE FINDINGS OF THE COURT OF APPEAL:

[15] Aggrieved, the defendants appealed to the Court of Appeal. The Court of Appeal found that Ujagar's will did not state that he wished to give effect to Nihal's intention to give the said property to the fourth plaintiff. It is not for the court to speculate in the absence of such words (*Julia Josephine Scale and another v Rawlins and others* [1892] AC 342 referred).

[16] The Court of Appeal viewed that the learned High Court judge had construed Ujagar's will by using Nihal's will. Hence, the learned High Court judge had erred as it is not for the court to rewrite the terms of Ujagar's will. There was absolutely nothing in Ujagar's will that divested the said property to the fourth plaintiff.

[17] The Court of Appeal emphasised that, when Ujagar made his will, the said property has not formed part of his assets yet, although Nihal's will was already in existence.

[18] Having read Ujagar's will, the Court of Appeal held that, it was his intention to limit his Malaysian estate only to those specifically listed in cl 3 and the said property was obviously not part of his Malaysian estate in the will.

[19] Ujagar's will does not contain residuary clause, which meant that Ujagar had never contemplated any other assets other than the three items listed in cl 3 of his will. Neither could he have contemplated his inheritance of the said property as he had not even inherited the said property at the time when he made the will. Therefore, the said property form the residuary estate, thus consequently it will pass to all the heirs at law of Ujagar as intestate property, in accordance with the Distribution Act 1958. In support, the Court of Appeal relied on *David Wee Eng Siew (administrator to the estate of Lim Eang Tee, deceased) v Lim Lean Seng & Anor (as executors and trustees of the estate of Lim Eow Thoon, deceased)* [2018] supp MLJ 50; [2014] 1 CLJ 299; *Hsu Yik Chai v Hsu Yaw Tang & Anor* [1982] 2 MLJ 227.

[20] The Court of Appeal was also mindful of s 18 of the Wills Act 1959, namely that the will of Ujagar was to take effect as if it had been executed immediately before his death ie on 4 December 2014, although it was made in 2007. However, the Court of Appeal was of the view that the object of interpreting a will is to give effect to the intention of a testator that is expressed in words of the will and such words are to be read in the light of the circumstances in which the will was made. As the facts show that when Ujagar made the will, the said property had not formed part of his assets although Nihal's will was already in existence. Upon scrutinising cl 3 of Ujagar's will, the Court of Appeal was of the view that the clause does not contemplate any other assets other than those three items listed therein. It was very clear in the mind of the Court of Appeal judges that the said property was not willed in Ujagar's will. The Court of Appeal emphasised that they were not looking at cl 3 alone but reading the will as a whole, including cl 4, and concluded that the said property was not part of his Malaysian estate in the will. As Ujagar's will did not have a residuary clause, the said property went into intestacy and consequentially it will pass to all the heirs at law as intestate property in accordance with the Distribution Act 1958.

[21] As a result, the Court of Appeal allowed the appeal in part and the decision of the High Court was set aside.

SUBMISSION BY THE DEFENDANTS/APPELLANTS

[22] Counsel for the defendants submitted that, the facts showed that Nihal predeceased Ujagar, and at the point when Ujagar passed away, Ujagar already had beneficial interest of the said property registered in Nihal's name. As such,

the said property formed part of Ujagar's Malaysian estate. Thus, the phrase, 'the whole of my Malaysian estate' in cl 3 of Ujagar's will, includes the said property. For this proposition, learned counsel for the defendants referred to ss 18, 20, 21 and 23 of the Wills Act 1959 to support this contention that, despite the fact that Ujagar's will did not specifically devise the said property, by referring to cl 3 of the will, the entire Malaysian estate of Ujagar Singh including the said property, had been devised and bequeathed to the first plaintiff. There is, therefore, no need for a residuary clause in Ujagar Singh's will.

[23] The defendants submitted that the Court of Appeal had overlooked the provision of s 18 of the Wills Act which speaks of 'contrary intention' of the will. There was no contrary intention in the will of Ujagar. The case of *David Wee Eng Siew v Lim Lean Seng* which the Court of Appeal relied upon, was the judgment of the Federal Court where there was a residuary clause and hence the property went into intestacy. It was submitted that the observation made by the Court of Appeal was pure obiter.

[24] On the point raised by the plaintiff and addressed by the Court of Appeal, that when Ujagar made the will, the said property has not formed part of his assets yet; although Nihal's will was already in existence, learned counsel for the defendants referred to the case of *Re Fleming's Will Trusts; Ennion v Hampstead Old People's Housing Trust Ltd and another* [1974] 3 All ER 323 at p 325 of the law report, where there was a bequest of a leasehold land at the time when the will was made, but subsequently the leasehold was converted into freehold. In this regard, s 23 of the Wills Act 1837 was relevant which provides that, every will is to be 'construed, with reference to the property comprised in it, to speak and take effect as *if it had been executed immediately before the death of the testator*'. It was held that on a 'true construction of the will, the testator intended that the first defendants should take the whole estate and interest existing in the property at the time of his death. The intention could not be negatived merely by the fact that the will referred to the estate and interest held by him at the date of the will. Accordingly the freehold passed to the first defendants'. In our present appeal, a similar provision is s 18 of the Wills Act 1959 and applying this particular provision to the present appeal, at the time of the demise of Ujagar, the said property was already part of his Malaysian estate which was devised and bequeathed to his trustee, the first defendant. Ujagar's will has brought about a complete testamentary disposition. Therefore, no partial intestacy arises at the time of his death.

[25] Another pertinent point is that, Ujagar's will contains an express exclusion clause, namely cl 4 which expressly excludes all the plaintiffs (being his other daughters and sons apart from the plaintiffs/appellants herein) as he had already made adequate alternative financial provision for them. Where the

A intention to exclude certain beneficiaries is expressed on a testamentary instrument, the absence of a residuary clause will not entitle those beneficiaries to take under the will and the bequest will be shared among those who the testator intended to benefit. Given the aforesaid, such is the position, when the default position applies in consequence of there being no residuary clause B (refer to *Re Sharpe* [1985] 18 DLR (4th) 421; *Re Wynn (deceased); Landolt v Wynn* [1983] 3 All ER 310). If an intestacy is declared in the present case, it would go against the express exclusion wordings of the will.

C **[26]** The Court of Appeal also overlooked a pertinent point, namely, the presumption against intestacy. The leading case on the presumption against intestacy is *West v West* [215] A D 285 which establishes the principle that the law favours a construction of a will that will prevent partial intestacy.

D SUBMISSIONS BY THE PLAINTIFFS/RESPONDENTS:

[27] The plaintiffs take the position that the construction given by the defendants of the phrase '... devise and bequeath the whole of my Malaysian estate both real and personal unto my trustee upon the following trusts ...' at E cl 3 of Ujagar's will to mean that the said 1/4 share also form part of Ujagar's estate therein and that it should be bequeathed to the first plaintiff, is misconceived and manifestly incorrect because:

(a) F the first plaintiff is not the sole beneficiary of Ujagar's Malaysian estate listed in his will. Ujagar intended for his Malaysian estate to be divested among the beneficiaries named therein (including the first plaintiff) as stated in the three sub-paras under para 3 of his will. It is a fact that there are other beneficiaries named in his will, including his grandson, clearly shows that Ujagar did not intend to divest the whole of his Malaysian estate solely to the first plaintiff. The first plaintiff was merely appointed G as an executor and trustee who was given the responsibility to execute the distribution of Ujagar's Malaysian estate in the manner specified in the three sub-paras under para 3 of the will; and

(b) H the said property is not listed nor divested to any particular beneficiary in Ujagar's will.

[28] The Court of Appeal considered Ujagar's will as a whole and made clear findings of fact that para 3 of Ujagar's will did not contemplate any other assets other than those three items listed and that the said 1/4 share was not willed in I Ujagar's will. These findings of fact do not constitute an error which justifies appellate intervention. As such the plaintiffs submitted that at the time when Ujagar made his will in 2007 at the age of 84, his intent is as stated in para 4 which has to be limited to the context of his existing Malaysian estate at the time he made his will in 2007. Therefore, this court should not strain Ujagar's

intent in para 4 to assets which were not yet acquired at the time he made the will. Doing so would amount to rewriting the will and would deprive the plaintiffs of their lawful inheritance.

[29] On the presumption against intestacy, the plaintiffs submitted that a plain and simple reading of Ujagar's will will inevitably result in a partial intestacy, no matter how undesirable it may be.

[30] Hence, the Court of Appeal correctly applied the law on the effect of the lack of a residuary clause in a testator's will as was decided by this court in *David Wee Eng Siew (administrator to the estate of Lim Eang Tee, deceased) v Lim Lean Seng & Anor (as executors and trustees of the estate of Lim Eow Thoon, deceased)* [2018] supp MLJ 50; [2014] 1 CLJ 299. The Court of Appeal had correctly decided that the said 1/4 share fell under partial intestacy and that it should be distributed in accordance to the Distribution Act 1958.

OUR DECISION

The law in construction of a will

[31] It is trite law that, when a deceased dies intestate/partially intestate, the distribution of his properties/assets will be made in accordance with the Distribution Act 1958. However, at times the wordings of a will may cause disputes amongst beneficiaries as the intention of the testator may not be expressed as clearly as it could have been. In such instances, the rules of construction in interpreting a will come into play.

[32] *Murray Estate* 2007 BCSC 1035 is a good case relating to the rules of construction in interpreting a will. In the interpretation of wills, it is trite law that the court will not alter or add to the words of the will unless it is perfectly clear that the will does not express the intention of the testator. The duty of the court in construing a will is to ascertain if possible what the testator meant, without any pre-conceived ideas as to his meaning and to give effect as far as possible to his intention as declared in the will (per Chang Min Tat J in *Re Chin Sem Lin's Settlement Yong Tet Foong & Anor v Chin Thin Lee & Ors* [1971] 2 MLJ 152 at p 154).

Presumption against intestacy

[33] It is a golden rule that if the will is capable of two interpretations, the court will prefer the interpretation which disposes of the whole estate in preference to that which results in an intestacy. This golden rule of the presumption against an intestacy found its way from the classic famous quote from *In Re Harrison Turner v Hellard* [1885] 30 Ch D 390:

A

> There is one rule of construction, which to my mind is a golden rule, that when a testator has executed a will in solemn form you must assume that he did not intend to make it solemn farce — that he did not intend to die intestate when he is gone through the form of making a will. You ought, if possible, to read the wills so as to lead to a testacy, not an intestacy. This is a golden rule.

B

Similarly in *Craig* (1977) 14 OR (2d) 589, the court affirmed on appeal and stated the rule specifically that:

> A court should only tamper with and add to the words of the will, particularly when drafted by a solicitor, where it is perfectly clear that the testator has not accurately, or completely expressed his intention. In other words, a case which is almost beyond argument.
>
> In order to supply words not present in the will, a court must be certain:
>
> (a) that there has been an unintentional omission and
>
> (b) as to the testator's precise intention, but the testator meant to do.

C

D

This principle was further restated in *Prouse v Scheuerman* 2001 BCCA 100.

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[34] Our local case further strengthened this golden rule that, in interpreting wills where the wordings are not clear and ambiguous, the court would apply certain principles that could assist in avoiding a case of partial intestacy. This was illustrated in the High Court case of *Tay Seck Loong @ Tay Seck Long & Ors v Teh Chor Chen & Ors* [2005] 7 MLJ 612 where it was held that there is a strong presumption that where one made a will, one did not intend to die intestate (see also *Howell v Howell Estate* [1999] BCCA 371). This presumption was discussed by Dorgan J in *Abercrombie Estate v Abercrombie* 2008 BCSC 389, at paras 16 and 18–19 as follows:

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> [16] Further, in the construction of wills, there is a strong presumption against intestacy. This often-cited principle was articulated by Lord Esher, MR in *Re Harrison Estate* [1885], 30 Ch D 290 at 393–4, as follows:
>
> There is one rule of construction, which to my mind is a golden rule, viz, that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce — that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.
>
> In *Baldissera v Baldassi* [1997] 18 E T R (2d) 128 (BCSC) at para 10, Edwards J, citing *The Canadian Law of Wills,* Vol 2, confirmed that:
>
> There is a presumption against intestacy and the court will prefer an interpretation of the will which avoids an intestacy.
>
> And further, at para 11, Edwards J held:
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> The court on reading the will as a whole may conclude that the testator clearly

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> intended to dispose of his entire estate. Once such an intention is clear the court will construe the will so as to give effect to the will in preference to a construction which will result in a partial or total intestacy.
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> [19] A similar conclusion is found in *Jankowski v Pelek Estate,* [1996] 2 WWR 457, 131 D L R (4th) 717 (Man CA), where Helper JA at para 76 stated, [i]f the will is capable of two constructions, one which disposes of the whole estate and the other which leaves part of the estate undisposed of, the court will prefer the former.

[35] Hence when a testator executed a will in solemn form, it is presumed that he did not intend to die intestate when he has gone through the form of making a will, and such presumption against intestacy should prevail. (Hanschell J in *Re Harford Harford v Morris and others* (1959) 1 WIR 310). We also need to refer to the observations of Lord Esher MR in the Court of Appeal in *In Re Harrison Turner v Hellard* [1885] 30 Ch D 390, which also dealt with the inference to be drawn from the fact that a testator who has gone through the act of making a will, where His Lordship was reported to have said:

> There is one rule of construction, which to my mind is a golden rule, viz, that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce — that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.

[36] The court will therefore attempt as far as possible to read the will such that there is no intestacy or at least minimal intestacy. However, this inference of intention ought not to be drawn, where the words of the will of the testator clearly intended to die intestate, wholly or partially, or where, on a fair and reasonable construction of a doubtful will, there appears ground for a contrary conclusion (*Re Harford*).

[37] The Federal Court in *Hsu Yik Chai v Hsu Yaw Tang & Anor* [1982] 2 MLJ 227, had the occasion to explain the role of the court in interpreting a will, namely to enable the testator's intentions. The circumstances in which the will was written would be taken into account, however, there is so much the court would do, as the court is still limited in giving effect to the testator's intentions in so far as they are written in the will. It should also be borne in mind that, in reading a person's will, the court will take the plain and obvious meaning of the testator's words (see *Tan Sri Dr M Mahadevan v Dr Jeyalaksami Ratnavale & Ors* [2017] 6 CLJ 49). From the aforesaid, if the will does not provide for the distribution of a particular property and there are no words in the will that could be interpreted to be a residuary clause, there is no way a court could assist in avoiding a case of partial intestacy. The court cannot read an intention in the will if it is not there.

The relevant provisions of the Wills Act 1959

[38] In dealing with the present appeal, we take note of the provisions of ss 18, 21, 23 and 24 of the Wills Act 1959 which are pertinent to the present appeal which read:

> 18 Wills shall be construed to speak from the death of the testator
>
> Every will *shall be construed*, with reference to the property comprised in it, to speak and *take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.*

Sections 21, 22 and 23 of the Wills Act 1959 provide that:

> 21 Devise or bequest without words of limitation
>
> Where property is devised or bequeathed to any person without any words of limitation, such devise or bequest *shall be construed to pass* the fee simple or other the right *to the whole estate* or interest in such property which the testator had power to dispose of by will *unless it appears by the will that only a restricted interest was intended* for such devisee or legatee.
>
> 22 Construction of words importing want or failure of issue
>
> In any devise or bequest of property the words 'die without issue' or 'die without leaving issue', or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will:
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> Provided that this section shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.
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> 23 Devise or bequest of property to trustee or executor
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> Where any property shall be devised or bequeathed to any trustee or executor, such devise or bequest *shall be construed* to pass the fee simple or other the right *to the whole estate* or interest in such property which the testator had power to dispose of by will *unless a lesser interest in such property shall thereby be given to him expressly or by implication.*

Interpreting Nihal's and Ujagar's will

[39] In the present appeal, the plaintiffs claimed that the transfer of the said property to the defendants was not expressly devised in Ujagar's will. For clarity, we find it pertinent to reproduce the relevant clauses of Nihal Kaur's and Ujagar Singh's will for reference:

> Nihal Kaur's will:

... 3. I give to my husband UJAGAR SINGH A/L PHUMAN SINGH [NRIC No: 231216–71–5151] absolutely my undivided share in the shop lot held under H.S. (D) 48086, P.T. 47593, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan, K.L., bearing the postal address of No. 16, Jalan 23/70A, Desa Sri Hartamas, 50480 Kuala Lumpur [hereinafter called the 'shop lot']. In the event my husband does not survive me, I give to my fourth son, HARJEET SINGH A/L UJAGAR SINGH [NRIC No: 691108–110–5409] a life interest in my undivided share in the shop lot. In the event he does not survive me upon his death, I give my undivided share in the shop lot to this natural children in equal shares and my Trustee shall hold on trust their beneficial shares until the youngest child attains the age of 30. In the event my fourth son does not have any surviving natural children, then I give to ...

Ujagar's will:

... 3 I appoint my son Kalwant Singh ['Kalwant'] (Malaysian IC NO: 600317–10–6487) of 10 Lorong 8/3E, Sec 8, Petaling Jaya to be the executor of an trustee ['my trustee'] of this my Malaysian will and estate and devise and bequeath the whole of my Malaysian estate both real and personal unto my trustee upon the following trusts.

(i) To sell call in and convert my shares and moneys held in banks and financial institutions for payment thereout of my just debts and funeral and testamentary expenses and to hold the residue on trust for my wife Nihal Kaur @ Manjeet Kaur ['nihal'] (Malaysian IC No: 380120–10–5016).

(ii) I give my one-fourth title share and interest in shophouse No: 16, Jalan 223/70A, Desa Sri Hartamas, Kuala Lumpur ('the said shophouse') being the land described in certificate of title HS(D) 48086 PT 47593, Mukim and Daerah Kuala Lumpur to my sons Kalwant and Hardeep Singh ['Hardeep'] (Malaysian IC NO: 5909107–10–6503) in equal shares as tenants in common subject to the life interest of my wife Nihal during her lifetime to the receipt and retention of all rentals receivable for the shophouse for her own benefit. The other part-owners of the shophouse Hardeep and Kalwant have agreed to honour this agreement.

(iii) I give my two-thirds share title and interest in house NO. 209 Jalan Maarof, Kuala Lumpur ('the said house') being the land held under certificate of title Geran 3114 Lot 28597 Mukim and Daerah Kuala Lumpur unto my son Kalwant and my grandson Talvinder Singh Choan in equal shares as tenants in common subject to the prior unconditional life interest of my wife Nihal to reside in the said house during her lifetime if she so decides.

4. I declare that I have intentionally not made provision under this my will for my daughters and other sons for reason that I have already made adequate alternative financial provision for them.

[40] We noted certain pertinent words in cll 3 and 4 of Ujagar's will which state:

> 3. I appoint my son Kalwant Singh ... to be the executor of and trustee ('my trustee') of this my Malaysian will and estate and devise and bequeath *the whole of my Malaysian estate* both real and personal unto my trustee upon the following trusts ...

In *In Re Wilson, Decd, Wilson v Mackay and others* [1967] Ch 53 at p 57, it has been held that:

> A gift can be residuary although no gift of a similar kind has been previously given. *A gift of 'all my real estate' includes any land held by the testator at his death.* Before the Wills Act 1837, the testator could give away realty, but only such as he owned at the date of the will. But since s 24 of the Wills Act 1837, every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear in the will ...

In *Re Fleming's Will Trusts; Ennion v Hampstead Old People's Housing Trust Ltd and another* [1974] 3 All ER 323, a testator, who by his will executed in 1969, willed his leasehold house to the first defendant. At that point in time, the house was held under a lease term expiring on 28 September 2008 subject to covenants to repair. The leasehold interest was not registered. In April 1971, the testator purchased the freehold and registered in the land registry with title absolute. The testator died in February 1973. The plaintiff as sole executor of the will, applied for determination of interest that passed on to the first defendant. The second defendants, who were residuary beneficiaries under the will claimed that the first defendant was only entitled to leasehold interest. Disagreeing with such contention, Templeman J, in delivering the judgment said:

> In my judgment, a gift of property discloses an intention to give the estate and interest of the testator in that property at his death; a mere reference in the will to the estate and interest held by the testator at the date of his will is not sufficient to disclose a contrary intention. It follows that the freehold in the case passes to the first defendant.

[41] The facts show that Nihal predeceased Ujagar. At the point when Ujagar passed away, he already had beneficial interest in the said property which was registered in Nihal's name. As such at that point in time, the said property formed part of Ujagar's Malaysian estate (going by the provision of s 18 of the Wills Act 1959). The case of *Tay Seck Loong @ Tay Seck Long* is relevant to our present case, where it was held at paras 25–30 that:

> [25] In my judgment, the clauses which fall to be construed are cll 4 & 5–6 which where relevant merits reproduction as follows:
>
> > Clause 4: I devise and bequeath all my movable and immovable property whatsoever and wheresoever situate (including any property over which I may have any general power of appointment by will) hereinafter called 'my residuary

> estate') to my trustees subject to the payment thereout of my debts funeral and testamentary expenses and death duties upon trust to manage the same until the youngest of my great grandsons who shall be living at my death shall attain the age of twenty one years ...
>
> [26] From the language used in these clauses, I am of the view that cl 4 reflects the intention of the testatrix to demise and bequest all her movable and immovable property to her trustees, and after the payment thereout of her debts, funeral and testamentary expenses and death duties, upon trust to manage the same until the date of distribution.
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> ...
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> [29] In relation to the issue of partial intestacy, as submitted for the aforesaid defendants, I am of the view that cases of partial intestacy would only arise under s 8 of the Distribution Act 1958 ('s 8'), where relevant, provides that where any person dies leaving a will beneficially disposing of part of his property, the provisions of the Distribution Act 1958 shall have effect as respects the part of his property not so disposed of, subject to the provisions contained in the will. Hence, s 8 regulates cases of partial intestacy in which a testator has made a will wherein only a part of his property is to be disposed of under his will, while the other part is not included in his will, as a result of which, only the part included in the will shall be dealt with by way of testamentary disposition.
>
> [30] The agreed facts show that the testatrix has vide cl 4 devised and bequeathed all her movable and immovable properties to her trustees. That being the case, the will has brought about a complete testamentary disposition. There is no question of a partial intestacy corning within the ambit and purview of s 8.

[42] It therefore follows from the expression in Ujagar's will, with particular reference to cl 3, the Malaysian estate was devised and bequeathed to his trustee, ie the first defendant. This would include all real or personal property belonging to or beneficially owned by Ujagar at the point of his demise which include the said property which Ujagar obtained from Nihal. Hence, Ujagar's will has brought about a complete testamentary disposition and therefore, the said property should be dealt with by way of testamentary disposition.

Exclusion clause

[43] We took note of the pertinent words in cl 4 of Ujagar's will which stated:

> 4.1 I declare that I have *intentionally not made provision under this my will for my daughters and other sons* for reason that I have already made adequate alternative financial provision for them.

Clause 4.1 is an express declaration by Ujagar Singh which excludes all the plaintiffs (being his daughters and other sons apart from the defendants herein).

[44] It is settled law that where the intention to exclude certain beneficiaries is expressed in a testamentary instrument, then the absence of a residuary clause will not entitle those beneficiaries to take under the will and the bequest will be shared among those who the testator intend to benefit. This is so, even when the default position applies in consequence of there being no residuary clause. The Supreme Court of Canada has the occasion to decide on this principle in *Re Sharpe* [1985] 18 DLR (4th) 421, where there was a specific devise made by the testator in favour of his son, Sharpe, but he did not dispose of the balance of his estate. In the will, the testator provided that his wife and his six other children were to receive nothing. Action was instituted by the administratrix to construe the will in question. It was held that:

> On a partial intestacy, normally the portion of the estate not dispose of by the testator in his will is to be distributed among the persons entitled on an intestacy in accordance with s 14 of the Intestate Succession Act, R S N 1970, c 183. However, where the testator clearly indicates in his will that some, but not all of those persons shall share in his estate, there is an implied gift to the other person or persons entitled on intestacy.

[45] Warner J in his reasons for His Lordship's judgment in *Re Wynn (deceased); Landolt v Wynn* [1983] 3 All ER 310, set out what is the correct statement of the law with regards to the declaration of exclusion of certain persons in a will, whereby a declaration excluding one or some only of the next of kin if made in clear and appropriate language, is valid, and operates as a gift by implication to the rest of the share of those who are excluded. In *Re Wynn (Decd)* it was held that:

> On its true construction the will excluded the husband from taking under the will or on the intestacy. Furthermore, the exclusion was valid ... and operated as a gift by implication of the husband's share to the other persons interested on the intestacy.

[46] In the instant appeal, Ujagar, in clear, unambiguous and appropriate language, excluded his daughters and other sons for reasons that he has provided for them financially. Hence, the intent of Ujagar is unmistakable. Where the testator's wishes are set in clear words and by necessary implication, it behoves upon the court to ensure that such wishes are implemented.

[47] The Court of Appeal found that there was no residuary clause in Ujagar's will, and hence, the said property fell into partial intestacy and was to be distributed in accordance with the Distribution Act 1958. This finding is against settled law and against the clear and express intention of Ujagar in his will at cl 4, which is to exclude all the plaintiffs. The wordings of cl 4 clearly depicts an intention not to benefit those who now claim a partial intestacy. There was no judicial appreciation of this point by the Court of Appeal.

[48] The Court of Appeal referred to and followed the Federal Court case of *David Wee Eng Siew (administrator to the estate of Lim Eang Tee, deceased) v Lim Lean Seng & Anor (as executors and trustees of the estate of Lim Eow Thoon, deceased)* [2018] supp MLJ 50; [2014] 1 CLJ 299, which in our view is distinguishable from the facts in our present case. Unlike the facts of our present case, in *David Wee* there is no express intention of the testator in the will to exclude certain beneficiaries.

CONCLUSION

[49] Given the aforesaid, the Court of Appeal fell into an erroneous finding that the subject property fell within the residuary estate of Ujagar and that since there is no residuary clause in Ujagar's will, it will be distributed to all the heirs at law as intestate property pursuant to the Distribution Act 1958.

[50] In construing the whole will, there is no intention on the part of the testator of a partial intestacy, in particular based on the words 'the whole of my Malaysian estate ...' read together with the expressed exclusion in cl 4 of the will. We therefore answered the question posed in the negative and allowed the appeal. We set aside the order of the Court of Appeal and ordered that the said property in dispute goes to the first defendant (the first appellant herein) as trustee and executor of the will to be distributed according to the will. We made no order as to costs.

Appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali